

DISCUSSION RESPONSE

## Climate Change and the Arctic as a Common Concern

VITO DE LUCIA — 9 May, 2016



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**A response to Birgit Peters.**

In her blog post Birgit Peters reflects on “recent rules and approaches” for protecting the Arctic region in a time of intense climatic changes. Peters emphasizes what she understands as a shift from traditional regulatory approaches that frame the Arctic as a common heritage and common concern, focused on prohibition, to an integrated approach focusing on sustainability. Peters in this respect discusses the role of the Arctic Council, as a way to emphasize the increasing focus on regional approaches to Arctic governance; and of the International Maritime Organization

(IMO), in order to highlight the effectiveness of unconventional rule-making procedures, such as IMO's tacit acceptance procedure. Her assessment is essentially positive, albeit she recognizes how focusing on sustainability may result in lower standards of protection than approaching the Arctic from a common heritage or common concern perspective (a perspective that, Peters suggest, has little political purchase given that "[i]nterests concerning resource extraction and shipping are too dominant"). In my response, I wish to focus on two points. First, I wish to distinguish between common heritage and common concern. Secondly, I wish to suggest that the Arctic *already and inevitably* is a common concern.

### **The Concept of Common Concern**

The concept of common concern has emerged, in its current legally significant form within the context of the Rio Summit in 1992. While climate change had been already recognized as a common concern by the UN General Assembly, the concept has taken specific shape in the two Rio Conventions, respectively the United Nations Framework Convention on Climate Change (UNFCCC) as regards the "change in the Earth's climate and its adverse effects" (preamble, 1<sup>st</sup> recital) and the Convention on Biological Diversity (CBD) as regards "the conservation of biological diversity" (preamble, 3<sup>rd</sup> recital). The main effect of considering an issue a common concern of humankind is its removal from the exclusive domain of sovereign jurisdiction (see Bowman, p. 503). In other words, identifying something as a common concern manifests the legitimacy of an involvement of the international community in matters that would otherwise fall exclusively within the domestic sphere. Indeed, as Hey suggests, common concern is a manifestation of a shift

towards a “publicization” of international law, that is a shift from traditional “inter-state normative patterns” to “common-interest normative patterns”.

At this point, it may be useful to highlight how there are some significant differences between common concern and common heritage. First, common heritage refers to a specifically material or geographical entity: Antarctica; the deep-sea bed; outer space. Common concern on the other hand refers to processes, goals or interests that do not have an immediate materiality. Secondly, while common heritage indeed entails a prohibitory regime (in relation to commercial and extractive activities for example), common concern focuses on cooperation and coordination (and arguably on the distribution of burdens), without establishing a specific substantive regime. Evidently, Peters’ analysis applies to common heritage, but less so, I would argue, to common concern. However, how is the Arctic a common concern?

### **The Arctic as a Common Concern**

There are two immediate ways to conceptualize the Arctic as a common concern (I will not linger on the fact that some parts of the Arctic, namely the deep seabed, are already under a regime of common heritage). First, certain processes for which the Arctic is a crucial element are a common concern, namely the adverse effects of climatic changes. Secondly, certain goals of the international community are particularly urgent in the Arctic, namely the conservation of biodiversity, also a common concern of humankind. Hence, it is not the Arctic as such that is conceived as a common concern. The Arctic functions rather as an amplifier of a problematic concern of the international community, and occupies a crucial role in relation to global issues such as global

warming. For example, the receding of Arctic sea ice has a crucial role for the climate (reduction of the Earth's ability to refract sunlight, which leads to increased heat absorption) and in relation to the conservation of biodiversity (from polar bears to fisheries).

However, the global environment, or rather its “ecological balance”, has been recognized by the International Court of Justice as an “essential interest” of all States. The Arctic, with its special vulnerability and for its crucial role in relation to climate change, may then also be considered as an essential interest of all States. That does not entail, in and of itself, a specific legal regime, but simply the recognition that all States have a legitimate stake in the governance and sustainable management of the Arctic.

### **Regional Arctic Governance: the Arctic Council**

The main argument for the soft regional governance embodied by the Arctic Council rests usually on the fact that the Arctic, unlike Antarctica, is an ocean, and as such is already subject to the legal regime established under the Convention for the Law of the Sea (LOSC). Additionally, the common concern of the international community in relation to the crucial role of the Arctic for global warming is managed and addressed through the UNFCCC, (in this respect it may be useful to also remember that the UNFCCC has explicitly delegated to the IMO the authority to regulate greenhouse gases emissions from international shipping). Arctic States, that is, States whose maritime jurisdiction extends into the Arctic region, have reiterated their commitment to LOSC and their role as stewards of the Arctic, for example in the Ilulissat Declaration. The Arctic Council is in this respect a unique forum for the coordination

and cooperation between Arctic States. Additionally, the Arctic Council includes as permanent participants six organizations representing Arctic indigenous peoples, and a number of States with particular interests in the Arctic have been granted the status of observer. Through the Arctic Council the Arctic States may thus claim to fulfill their obligations towards the common concern of the international community

However, climate change is bringing to light a series of problems that are not easily addressed by the existing legal regimes, and that further highlight the special vulnerability of the Arctic, and its special importance for the global ecological balance. The retreat of the ice and the change in ocean temperatures are raising important challenges in relation to biodiversity conservation, to the regulation of new and exploratory fisheries, to resources exploitation and shipping traffic, as well as in relation to the social issues such as the viability of traditional modes of livelihood in the face of rapid climatic changes.

The Arctic Council is in some ways addressing the interests of the international community (both State and non-State actors) through its permanent participant mechanism and the observer States mechanism. However, the Arctic States remain in many ways arbitrarily in control of who is admitted to the Council as observer (The EU hasn't yet been granted that status, despite its obvious interest in the Arctic), and continue to be dismissive of any suggestion of a wider and binding arrangement for the Arctic. Yet as the Council gains in importance, in relation to the regional governance model that Peters point to, and because of its novel role of facilitating regional binding agreements, these aspects may become increasingly problematic. Moreover, the

consideration that the emerging conceptual and legal framework of the ecosystem approach is challenging the traditional legal geographies and relations of responsibility between States, further requires a transversal and trans-jurisdictional appreciation of environmental issues.

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## 1 Comment



**BIRGIT**

18 May, 2016 at 18:58 (Edit) — Reply

Dear Vito, thanks a lot for those clarifying remarks concerning the concepts common concern and common heritage. In my post, I deliberately refrained from commenting on whether and which of those concepts actually fitted the current governance regime of the Arctic, or the governance regimes envisaged for the Arctic. Past propositions focusing on a new treaty for the Arctic, have been rather vague on this point. See, for example, the language in this proposal: <http://www.carc.org/pubs/v19no2/5.htm>, which leans much toward the Antarctic approach. Hence, my point was rather to contrast the past 'binding treaty approach' with those approaches which the Arctic Council and the IMO have been taking over the recent years. Best, Birgit

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